Supreme Court, U.S.
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In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, Jeffrey Gorman, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's decision in this case.

STATEMENT

After being asked to leave a Kansas City nightclub because he was in a wheelchair, Jeffrey Gorman, who suffers from paraplegia, exited as requested. He then solicited assistance from uniformed police officers of the Kansas City, Missouri Police Department (KCMOPD) in correcting the acts of discrimination against him. The officers, working off-duty for the nightclub, ignored Gorman's efforts to explain the discriminatory acts which had occurred and placed him under arrest for trespassing. The officers requested a KCMOPD police van for transport. When it arrived, Gorman told officers that he could not be safely transported in the van because of his disability. Again ignoring Gorman, officers removed him from his wheelchair, propped him on a bench, and tied him to the van wall. During transport, Gorman fell from the bench and was injured. Petitioners' Petition, Appendix, 36a-37a.

Those injuries included shoulder injuries that required surgery and back injuries for which there are no surgical options. Appellant's Supp. Appendix, Eighth Circuit, 23, 26-29. He also suffered a bladder infection for which he was treated with antibiotics. Appellant's

Appendix, Eighth Circuit, 108. He has suffered and will continue to suffer extensive pain from the back injuries. District Court trial transcript, 171. His shoulder and back injuries make it difficult for him to sit and restrict his use of a wheelchair, limiting significantly his mobility, his ability to work, and his future earnings. Appellant's Supp. Appendix, Eighth Circuit, 30; District Court trial transcript, 437-440. He will suffer pain from his back injuries throughout his life and will require ongoing pain management treatment. District Court trial transcript, 171.

Gorman sued the transporting officer of the KCMOPD and the Board of Police Commissioners of Kansas City, Missouri, for their failure to make accommodations during his arrest and transport as required by § 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. § 12132. Gorman sought damages for injuries he suffered as a result of the Petitioners' failure to make accommodations necessary because of his disability.

At trial, Petitioners stipulated that the KCMOPD had been accepting Federal funds contingent on compliance with regulations implementing § 504 and had signed affidavits each year from 1981 to 1995 (three years after Gorman was injured) stating the KCMOPD was in compliance when, in fact, it was not in compliance. Additionally, the Petitioners stipulated they had never instituted policies regarding transportation and detention of persons with a disability, had never trained officers regarding the transportation and detention of persons with a disability, and had no procedures for accommodating arrested persons with disabilities as required by those

regulations. Stipulation, Appellant's Appendix, Eighth Circuit, 135-136. KCMOPD officers testified that they did not know how to transport Gorman and were unable to transport him appropriately. Appellant's Appendix, Eighth Circuit, 117-123, 128-130, 133.

REASONS THE PETITION SHOULD BE DENIED

I. This case is not properly reviewable by the Supreme Court because the litigation below is interlocutory with regard to the issue on which the Petitioners seek review.

A final judgment regarding punitive damages has not been issued in this case. The Eighth Circuit remanded this case to the district court for consideration of whether punitive damages are appropriate in this specific case. *See* Petitioners' Petition, Appendix, 16a. The district court has not yet reviewed the case as ordered by the Eighth Circuit. If the district court determines punitive damages are not appropriate, the question presented will not be at issue in this case. Additionally, the Eighth Circuit said that it had an obligation to review the district court's finding. *Id.*

In *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the petition for certiorari was denied because the litigation below had not come to final judgment. *Virginia Military Institute* is like this case in that the court of appeals vacated the judgment in favor of the petitioners and remanded the case to the district court for determination of an appropriate remedy. *Id.* In *Virginia Military Institute*, Justice Scalia, in denying the petition,

said: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction". *Id.*; *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (describing "the Court's normal practice of denying interlocutory review."); *see generally* R. Stern, et al., *Supreme Court Practice* 195-96 (7th ed. 1993).

In sum, the district court should be allowed to make its determination as to whether the evidence in the case supports the award of punitive damages, and the Eighth Circuit should be allowed to review the decision of the district court. If punitive damages are not granted, there may be no controversy for this Court to decide. This Court should not review the case until the issue is fully resolved and there is a final judgment below.

II. Petitioners misstate and exaggerate the conflict among the circuits.

The Petitioners attempt to show that there is a conflict among the circuits on whether punitive damages are allowable under § 504 or Title II. At most there is a one-one split between the Eighth Circuit in this case and the Sixth Circuit.

The Petitioners argue that there is a conflict among the circuits based on four cases. They contend that this case (Eighth Circuit) and *Pandazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994) allow punitive damages and that *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) and *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001) do not allow them.

Doe v. County of Centre does not evidence a circuit split. *Doe* held that a municipality was not liable for punitive damages under § 504 and Title II under the rationale of this Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). *Doe*, 242 F.3d at 457-458. Unlike this case, *Doe* did not consider whether punitive damages are available generally under § 504 or Title II. Municipal liability for punitive damages under § 504 or Title II was never addressed at any point in this case. Further, as explained below at p. 6, Petitioners have waived any issue regarding Petitioners not being liable for punitive damages because the Board of Police Commissioners is a municipal entity, and therefore, a conflict in the circuits can not be premised on that issue.

In *Pandazides*, the Fourth Circuit stated in dicta that punitive damages can be awarded under § 504. In *Pandazides*, an employment case against a state defendant, the court only held that because compensatory damages could be awarded under § 504 claims the plaintiff had a right to a jury trial. *Pandazides*, 13 F.3d at 829-832. The dicta about punitive damages was not necessary for a decision in the case. Because the Fourth Circuit did not actually rule on the award of punitive damages under § 504, that case does not support review.

The only other case cited by Petitioners in arguing there is a split is *Moreno*, an employment case against a private employer. *Moreno*, 99 F.3d at 784. *Moreno*, by itself, does not present the depth of a split required for this Court to grant a petition for certiorari. *See* R. Stern, et al., *Supreme Court Practice* 171 (7th ed. 1993), for comments from Justice Brennan and Justice Stevens about the

depth of a split required for this Court to grant a petition for certiorari.

III. No reason exists for grant of the petition for certiorari because the Eighth Circuit decision is correct.

The Eighth Circuit correctly decided the question before it: whether punitive damages are available under § 504 and Title II. Where Congress is silent as to remedies available in an implied right of action as in § 504 and Title II cases, this Court has made it clear that any appropriate relief is available: "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992). The Eighth Circuit applied this rule and determined that, if appropriate in this particular case as determined by the district court on remand, punitive damages are available under § 504 and Title II.

WAIVER BY PETITIONERS OF RIGHT TO ARGUE THAT PUNITIVE DAMAGES CANNOT BE AWARDED AGAINST A MUNICIPALITY

The Petitioners have waived their right to argue that punitive damages should not be awarded because the Board of Police Commissioners is a municipality. They waived it because they did not argue below that punitive damages cannot be awarded against a municipality under § 504 or Title II. In regard to punitive damages, the issue before the district court and the Eighth Circuit was

always and only whether punitive damages are allowed under § 504 or Title II against any defendant, municipal or non-municipal.

This Court has consistently held that it does not in the first instance decide questions neither raised nor resolved below. *TRW, Inc. v. Andrews*, 122 S.Ct. 441, 450-451 (2001); *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511, 514 (2001) (per curiam); *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). The first time Petitioners argued that punitive damages are not allowed against a municipality under either § 504 or Title II was in their petition for certiorari. Further, the first time Petitioners raise *City of Newport v. Fact Concerts, Inc.* and *Doe v. County of Centre* as the basis for not allowing punitive damages against a municipality is in their petition. Therefore, the Petitioners waived their right and should not be permitted to raise this question and to rely on *City of Newport* and *Doe v. County of Centre* for the first time in this Court.

The Petitioners' argument based on *City of Newport* and *Doe v. County of Centre* was never raised, considered, briefed, or argued by Petitioners, the Respondent, or the district court before or in the course of the trial, in the Petitioners' motion for a new trial, in the district court's opinion, in the Petitioners' briefs to the Eighth Circuit, at oral argument in the Eighth Circuit, by a supplement to the Eighth Circuit under F.R.A.P. Rule 28(j), in the Eighth Circuit's decision, or in the Petitioners' motion for reconsideration in the Eighth Circuit.

The Petitioners were given clear notice that punitive damages would be an issue in this case. The jury instructions were unambiguous, and the Petitioners had ample opportunity to object and failed to do so on the ground that they are a municipality. When invited by the district court to brief the issue of punitive damages, the Petitioners declined to do so. District Court trial transcript, 10, 13, 275. The issue is therefore waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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